COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1286 **Cir. Ct. No. 2004CV279**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOHN BETTENDORF,

PLAINTIFF-RESPONDENT,

V.

ST. CROIX COUNTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Reversed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. This is an appeal by St. Croix County from a summary judgment order and declaratory judgment enforcing the commercial zoning of John Bettendorf's property. The County contends the trial court erred in enforcing St. Croix County, Wis., Ordinance 108(85) (March 12, 1985), because

the entire ordinance is invalid based on an invalid conditional clause.[1] Bettendorf contends that even if the ordinance is invalid, his special exception use permit grants him an unconditional right to operate a business on his property. The County contends Bettendorf's special exception use permit is invalid based on the invalidity of the underlying ordinance. We agree that the entire ordinance is invalid and that the permit is therefore also invalid. Accordingly, we reverse.

Background

¶2 The following is taken from the circuit court's memorandum decision and order, its order and judgment, and the parties' affidavits and other materials submitted on summary judgment. John Bettendorf owns a parcel of land in the Town of Kinnickinnic, St. Croix County, Wisconsin. Bettendorf has used his land for commercial purposes since 1971, although the land was not then zoned for commercial use.

¶3 In a St. Croix County Comprehensive Zoning, Parks, and Planning Committee Hearing on January 14, 1985, Bettendorf requested to rezone his land to commercial. The Committee recommended allowing a portion of Bettendorf's property (Lot 1) to be rezoned for commercial purposes, but with the condition that if Bettendorf sold the property it would revert to agricultural residential. The St. Croix County Board then enacted Ordinance 108(85) in March 1985, which

[1] Bettendorf argues that the County should not be allowed to profit from enacting an invalid ordinance. The proper question, however, is whether the County can challenge the validity of its own ordinance. *See, e.g.*, ***Silver Lake Sanitary Dist. v. Wisconsin Dep't of Natural Res.***, 2000 WI App 19, ¶7, 232 Wis. 2d 217, 607 N.W.2d 50 (Ct. App. 1999) (stating the general rule that a state agency cannot challenge the constitutionality of state statutes). Because Bettendorf has not sufficiently developed the argument that a county may not challenge its own ordinances, we will not address that issue. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (citing ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980)).

rezoned Lot 1 to commercial with the condition that the rezoning was only for Bettendorf's use and was not assignable (the ownership clause).

¶4 In 1990, Bettendorf submitted an application to the St. Croix County Board of Adjustment for a special exception use permit to build a truck repair shop and transfer point on Lot 1. The board of adjustment granted Bettendorf a special exception use permit for a truck repair shop and transfer point without any conditions.

¶5 Bettendorf commenced this action against St. Croix County to obtain a declaratory judgment that his special exception use permit was valid and transferable. He also sought judgment that the ownership clause of Ordinance 108(85) was invalid and severable from the remainder, leaving his property rezoned commercial without any conditions. The County counter-claimed, agreeing that the ownership clause of Ordinance 108(85) was invalid and seeking judgment declaring the entire ordinance void from its enactment because the invalid ownership clause was not severable from the remainder.[2] It also sought a judgment declaring the special exception use permit invalid based on the invalidity of the underlying ordinance. Both parties then moved for summary judgment.

¶6 The circuit court granted summary judgment to Bettendorf. It declared that the ownership clause was invalid, that Ordinance 108(85) was severable and thus valid as to the remainder, and that Bettendorf could transfer his

[2] Both parties assert the ownership clause is invalid and the circuit court incorporated that conclusion in its ruling. Because there is no dispute as to the invalidity of the ownership clause, we limit our discussion to the effect of the invalid clause on the remainder of the ordinance.

special exception use permit to a subsequent purchaser. The County now appeals from the summary judgment and declaratory judgment rulings.[3]

Standard of Review

¶7 We review the trial court's ruling on summary judgment de novo. ***Town of Baraboo v. Village of West Baraboo***, 2005 WI App 96, ¶5, 283 Wis. 2d 479, 699 N.W.2d 610 (citation omitted). Because both parties have moved for summary judgment, the facts are effectively stipulated and we review only the application of the law to those facts. *See* ***Lucas v. Godfrey***, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991) (citation omitted). We therefore apply the same methodology and standards as the trial court, without deference to the trial court's decision. ***Baraboo***, 283 Wis. 2d 479, ¶5. That methodology is well established and need not be repeated here. In reviewing a summary judgment order, we look to whether the record establishes that "the moving party is entitled to judgment as a matter of law." ***Id***.

¶8 This case requires us to interpret St. Croix Zoning Ordinance 108(85). The meaning of an ordinance is a question of law, which we decide de novo. ***Hambleton v. Friedman***, 117 Wis. 2d 460, 461, 344 N.W.2d 212 (Ct. App. 1984). Further, severability is determined by an analysis of the legislative body's intent, which we also review de novo. *See* ***In re Hezzie R.***, 219 Wis. 2d 848, 866, 580 N.W.2d 660 (1998).

[3] The County also appeals from the judgment awarding costs to Bettendorf. Because we reverse the summary judgment order, we necessarily reverse the order for costs.

Discussion

¶9 The County argues Ordinance 108(85) is not severable because without the ownership clause, the ordinance does not present a complete law intended by the County Board. Thus, according to the County, the entire ordinance fails. We agree.

¶10 We construe ordinances in the same manner as we do statutes. ***Hambleton***, 117 Wis. 2d at 461-62. Thus, we look to case law on statutory interpretation for guidance. *See* ***id.*** at 462. It is well established that if a statute has two distinct parts that are separable and not dependent on each other, the invalid portion can be severed, leaving the remainder in effect. ***Hezzie R.***, 219 Wis. 2d at 863 (citations omitted). However, "where the void part of a statute was evidently designed as compensation for or an inducement to the otherwise valid portion, so that it must be presumed that the legislature would not have passed one portion without the other … the whole statute must be held void." ***Id.*** at 863 (citations omitted). Thus, "if there appears to be reason from the act itself for the conclusion that it was intended as a whole and the legislative body would not have enacted the valid part alone, in that instance if one is void the whole is void." ***City of Waukesha v. Town Bd. of Waukesha***, 198 Wis. 2d 592, 607, 543 N.W.2d 515 (Ct. App. 1995) (citation omitted).

¶11 Bettendorf argues that while the legislative body's intent is usually considered in determining severability, in this case it is immaterial. He argues that, instead, the ordinance must be severed pursuant to the St. Croix County

Zoning Code's severability clause.[4] He contends that we only look to legislative intent when the legislative body has been silent as to severability, not when it has enacted a severability clause.

¶12 Bettendorf's argument is contrary to the supreme court's analysis of severability in ***City of Madison v. Nickel***, 66 Wis. 2d 71, 223 N.W.2d 865 (1974). There, the court analyzed the severability of Madison's obscenity ordinance in light of the severability clause in the Madison General Ordinances. ***Id.*** at 78-80. Despite the existence of the severability clause, the court looked to the common council's intent in enacting the ordinance. ***Id.*** The court explained that a severability clause is not controlling, although it is afforded great weight in determining severability. ***Id.*** at 80. The court concluded: "[B]ased on the content of the ordinance, the time at which it was enacted, and the existence of the severability clause … the common council did not intend the entire ordinance to fail [when one portion became unconstitutional]." ***Id.*** Thus, a severability clause is afforded great weight as one factor in determining a legislative body's intent of severability, rather than supplanting that analysis altogether.[5]

[4] The severability clause, ST. CROIX COUNTY, WIS., ZONING CODE § 17.04 (1986), was not introduced into the trial record. However, the circuit court quotes the severability clause in its memorandum decision and order as follows: "If any section, clause, provision or portion of this chapter is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this chapter shall not be affected thereby."

[5] The parties disagree over the scope and application of the St. Croix Zoning Code's severability clause. Bettendorf contends that the Code's severability clause mandates severability of Ordinance 108(85) because of the absence of any language in the ordinance excluding it from the scope of the severability clause. The County, however, contends that the clause applies to the severability of Ordinance 108(85) from the rest of the Code, but not to the severability of portions of Ordinance 108(85) itself. It argues that the absence of a severability clause within Ordinance 108(85) indicates that the County Board did not intend its severability.

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¶13 We turn, then, to discuss the County Board's intent in enacting Ordinance 108(85) to determine whether the ownership clause is severable from the remainder. We begin with the plain language of the ordinance, and it is not ambiguous. ***Hezzie R.***, 219 Wis. 2d at 866 (citation omitted). Ordinance 108(85) states, in pertinent part:

> NOW THEREFORE, BE IT ORDAINED, that the Comprehensive Planning, Zoning, and Parks Committee recommends approval for the rezonement to Commercial from Ag-Residential the following:
>
> > A parcel of land located in the NE1/4 of the NE1/4 of Section 19, T28N-R18W, Town of Kinnickinnic. This only for John D. Bettendorf's use and is not assignable.

¶14 We conclude that the language of the ordinance rezoning Lot 1 "only for John D. Bettendorf's use" makes clear that the County Board intended to rezone the land only with that limitation. If the ownership clause is excised, the ordinance is given an effect clearly not intended by the County Board: the rezoning of Lot 1 becomes permanent and completely assignable. This rendering of the statute cannot be reconciled with the clear intent of the County Board to rezone the land specifically for Bettendorf's benefit and to disallow commercial use upon transfer of the property.

We need not decide the scope or application of the Code's severability clause. Even assuming the clause applies to Ordinance 108(85), and thus affording it great weight in our analysis, we still conclude that the County Board clearly intended to enact the ordinance only in its entirety and severance is thus prohibited as contrary to legislative intent. *See* ***City of Madison v. Nickel***, 66 Wis. 2d 71, 78, 80, 223 N.W.2d 865 (1974) (concluding that "the determination as to whether an invalid portion of a statute or ordinance fatally infects the remainder of such law is a question of legislative intent," and "the existence of a severability clause, while not controlling, is entitled to great weight in determining whether valid portions of a statute or ordinance can stand separate from any invalid portion").

¶15 Ordinance 108(85) does not contain two distinct provisions, so that striking the ownership clause leaves a separate, complete ordinance capable of being carried into effect. *See* ***Waukesha***, 198 Wis. 2d at 607. Rather, striking the ownership clause subverts the very meaning of the ordinance and the intent of the county board in enacting it. Because it is clear from the language of Ordinance 108(85) that the county board intended the ordinance as a whole and would not have rezoned Lot 1 without an ownership clause, we conclude that Ordinance 108(85) is not severable. Thus, the invalidity of the ownership clause necessarily invalidates the entire ordinance.

¶16 Next, we turn to the County's argument that Bettendorf's special exception use permit is invalid based on the invalidity of the underlying zoning ordinance. The County asserts that a special exception use permit is a component of a zoning ordinance that must comport with the underlying zoning. Because Bettendorf's special exception use permit does not comport with agricultural residential zoning, the County contends, the permit is invalid. Bettendorf argues that, on the contrary, his special exception use permit supersedes the underlying zoning ordinance and thus grants him the unconditional right to use his land for commercial purposes despite its incompatibility with the zoning.[6] We conclude

[6] Bettendorf relies on our decision in a prior proceeding between the same parties as precedent that a special exception permit supersedes the underlying zoning. In ***Bettendorf v. St. Croix County Board of Adjustment***, 224 Wis. 2d 735, 741 n.3, 591 N.W.2d 916 (Ct. App. 1999), we stated in dicta, addressing an argument we did not reach in the opinion: "In addition, if the conditional use permit changes the zoning for that piece of property from agriculture/residential to commercial, then the zoning regulations in place for commercial would seem to follow." Bettendorf's reliance is misplaced. Because we did not need to decide the effect of the conditional use permit on the zoning, our statement in ***Bettendorf*** is not binding precedent. *See* ***State v. Matson***, 2003 WI App 253, ¶24, 268 Wis. 2d 725, 674 N.W.2d 51 (Ct. App. 2003) (citation omitted).

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that a special exception use permit cannot allow a use of property that contravenes its zoning, and thus Bettendorf's permit is invalid.[7]

¶17 A special exception use—or "conditional use"[8]—permit is allowed within the provisions of a zoning ordinance "where a particular use, although not inherently inconsistent with the use classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone." ***Rainbow Springs Golf Co., Inc., v. Mukwonago***, 2005 WI App 163, ¶13, 284 Wis. 2d 519, 702 N.W.2d 40 (quoting ***State ex rel. Skelly Oil Co. v. Common Council***, 58 Wis. 2d 695, 700-01, 207 N.W.2d 585 (1973)). Thus, through conditional use permits, certain uses that

> should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case.

Further, a conclusion that a conditional use permit can change the zoning of a piece of land is contrary to our own precedent and thus we had no power to reach such a conclusion. *See* ***City of Waukesha v. Town Bd. of Waukesha***, 198 Wis. 2d 592, 604, 543 N.W.2d 515 (Ct. App. 1995) ("A conditional use must be consistent with the use classification of a particular zone."); ***State v. Bolden***, 2003 WI App 155, ¶9, 265 Wis.2d 853, 667 N.W.2d 364 ("We conclude that the constitution and statutes must be read to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.") (quoting ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997)). Thus, ***Bettendorf*** has no bearing on our decision today.

[7] Because we conclude that the special exception permit is invalid based on the invalidity of the underlying ordinance, we need not reach the parties' arguments over whether a special exception permit is transferable or runs with the land.

[8] Under the St. Croix Zoning Code, the permit issued to Bettendorf was titled a "special exception use permit," although these types of permits are frequently referred to as "conditional use permits." *See* ***State ex rel. Skelly Oil Co. v. Common Council***, 58 Wis. 2d 695, 700, 207 N.W.2d 585 (1973). In this opinion, we use the terms interchangeably.

Id. (quoting ***Skelly***, 58 Wis. 2d at 701).

¶18 Here, the St. Croix Zoning Code provides "special exceptions" within its zoning districts consistent with this definition. Within each district, the Code lists "permitted uses," which are granted permits simply by virtue of appearing on the list, and "special exceptions," which are granted permits only upon approval by the board of adjustment. Special exception use permits are granted only if they do not "violate the spirit or general intent" of the Zoning Code. Further, the application for a special exception explains:

> Special exception use permits …. are made available to validate uses which, while not approved within the zoning district in question, are deemed to be compatible with approved uses and/or not found to be hazardous, harmful, offensive or otherwise adverse to other uses, subject to review by the circumstances and the imposition of conditions, subject to the provisions of St. Croix County Zoning Ordinance.

¶19 When the board of adjustment approved Bettendorf's application for a special exception use permit for a truck repair shop and transfer point in 1990, Lot 1 was designated a commercial district by Ordinance 108(85). Thus, to issue the special exception permit, the board of adjustment was required to find that a truck repair shop and transfer point was compatible with commercial use.[9] However, because we have concluded that Ordinance 108(85) is invalid, Lot 1 is correctly zoned agricultural residential. Thus, because a special exception use permit cannot allow a use incompatible with or adverse to the underlying zoning

[9] In addition to the listed permitted uses for a commercial district, the Code allows special exceptions for "[a]ny similarly compatible commercial enterprise …."

ordinance, Bettendorf's permit for a truck repair shop and transfer point in an area zoned agricultural residential is necessarily invalid.[10] We therefore reverse.

By the Court.—Judgment and order reversed.

Not recommended for publication in the official reports.

[10] A truck repair shop and transfer point is not listed in the enumerated "special exceptions" allowed under the agricultural residential district in the Code.